Filed 6/25/12 P. v. Gomez-Hernandez CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. HEBHERT YAMIL GOMEZ-HERNANDEZ, Defendant and Appellant.	C064787 (Super. Ct. No. 06F06639)

Defendant Hebhert Yamil Gomez-Hernandez appeals from a March 2010 order of the Sacramento County Superior Court denying his motion to vacate the judgment of conviction on the ground he received a defective advisement of the immigration consequences of his no contest plea.[1] (Pen. Code, § 1016.5.)[2] The court

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[1] The trial court issued a certificate of probable cause.

denied the motion because, when defendant entered his plea, he did not "plead[] to the sheet" and instead received "the benefit of a significant bargain . . . ."

The record shows that defendant *did* plead "to the sheet," and it fails to show that he received some other "significant bargain." Because the trial court's other reasons for denying the motion also fail, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was born in Nicaragua and was brought to the United States in July 1984 at age 11 weeks. He has been a Lawful Permanent Resident of the United States since November 1995. He is the father of two children, ages seven and three, who are United States citizens. Defendant had no criminal record prior to the present matter.

In August 2006, a complaint was filed charging defendant with possession of marijuana for sale (Health & Saf. Code, § 11359) and alleging he was armed with a .22 caliber pistol in the commission of the offense (§ 12022, subd. (a)(1)).

In September 2006, defendant appeared before the trial court "prepared to accept the offer of the District Attorney." Instead of terms of 16 months, two years or three years for the offense plus one year for the enhancement, defendant was to be placed on probation for up to five years with no more than 150 days of incarceration at the outset.

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2 Further statutory references are to the Penal Code unless otherwise indicated.

The trial court attempted to advise defendant of the immigration consequences of the plea by stating: "If you are not a United States citizen, you can be deported, *excluded from naturalization*, be denied naturalization as a United States citizen." (Italics added.)

The prosecutor stated the factual basis of the plea as follows: "In the County of Sacramento on July 6th, the year 2006, the defendant was found to be in possession of marijuana, and an expert would testify based on the indicia, quantity and money, that it was possessed for the purpose of sale. [¶] In addition, the defendant was found to be a principal in the 11359 and armed with a .22 caliber pistol."

Following the advisement and statement of factual basis, defendant pleaded no contest to the charge of possession of marijuana for sale and admitted the firearm allegation.

In October 2006, a probation report found one circumstance in aggravation (planning and professionalism; Cal. Rules of Court, rule 4.421(a)(3))[3] and three circumstances in mitigation (no prior record (rule 4.423(b)(1)), early acknowledgment of wrongdoing (rule 4.423(b)(3)), and youthfulness (22 years; rule 4.408). The report noted that defendant had a child whose well-being may be affected by his incarceration. (Rule 4.414(b)(5).)

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[3] Further references to "rules" are to the California Rules of Court.

The probation report's only evidence of "planning" or "professionalism" was the separation of the marijuana into two quantities and the maintenance of pay-owe sheets.

Imposition of judgment was suspended and defendant was placed on probation for three years conditioned on service of 150 days of incarceration with a recommendation for work furlough. By October 2009, defendant had completed his probation; had paid all fines, penalties, and assessments; and had not reoffended.

In December 2009, the United States Department of Homeland Security issued to defendant a Notice to Appear (NTA), which is the charging document in removal (deportation) proceedings. In February 2010, the Immigration Judge in defendant's case sustained the allegations and charge of removability in the NTA, thus finding him removable. In June 2010, the Immigration Judge reiterated his order removing defendant to Nicaragua.[4] The Immigration Judge denied two forms of relief from removal that defendant had sought in the removal proceeding: (1) withholding of removal, and (2) deferral of removal under Article III of the Convention Against Torture.

In January 2010, defendant filed a motion to vacate his conviction under section 1016.5, subdivision (b). In March 2010, the trial court considered defendant's motion. The court found that "clearly, the admonition in [section] 1016.5 is mandatory, and it is clear that an adequate admonition was not given in this case, certainly not complying with . . . Section 1016.5."

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[4] In July 2010, this court granted defendant's request for judicial notice of the Immigration Judge's order of June 2010.

The trial court went on to find that, even though the admonition was defective, defendant had not demonstrated prejudice for several reasons. First, the court stated "I know that there's a mechanism that if [defendant] agrees to a voluntary removal that he will not necessarily be barred from readmission to the United States."

Next, the trial court found the advisement was not prejudicial because the defect consisted of omission of language regarding exclusion from admission to the United States, and defendant currently was facing deportation rather than exclusion. Thus, the court reasoned that his motion was premature. ("Even if inadmissibility for re-entry in the United States automatically flows from that, I would have to find that the complaint now is premature and speculative.")

The trial court appears to have reasoned that defendant suffered no prejudice because, at the time of the plea, he was represented by counsel and "[t]here was an appreciable amount of time between representation and the entry of plea. There was no rush through this plea. Had anybody wanted more time to understand these ramifications, then there could have been that time."

When defense counsel remarked that defendant had "put it in his affidavit -- had he known about these consequences, he would not have entered this plea," the trial court responded, "[w]ell, *I got to measure it at the time of the plea.* Certainly, now that [defendant] is facing those [immigration] consequences, in

retrospect, *I'm sure he would not have* [entered the plea], but retrospect really isn't the test here." (Italics added.)

The trial court found that defendant had failed to establish that it was reasonably probable he would not have entered the plea if properly advised. The court explained, "*[t]his isn't a situation where he is pleading to the sheet* or he is pleading to a particularly egregious consequence, *he is getting the benefit of a significant bargain here*. And like I say, I've got to consider in the real world if at that time he would not have entered the plea but because of that consequence, and I just can't find that." (Italics added.)

DISCUSSION

Defendant contends the trial court should have vacated his conviction under section 1016.5, subdivision (a) because he did not receive the required immigration warnings prior to his plea, and the defective warning was prejudicial. Because no substantial evidence supports the trial court's finding that the defect was *not* prejudicial, we reverse.

Section 1016.5, subdivision (a) provides that, before the court can accept a guilty or no contest plea, the court must advise the defendant as follows: "If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

"Section 1016.5 incorporates several distinct terms of art from immigration law. 'Deportation is the removal or sending

back of an alien to the country from which he or she has come . . . .' [Citation.] 'Exclusion' is 'being barred from entry to the United States.' [Citation.] 'Naturalization' is a process by which an eligible alien, through petition to appropriate authorities, can become a citizen of the United States. [Citation.]" (*People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 207-208 (hereafter *Zamudio*).)

The advisement "must occur within the context of the taking of the plea," in order to "ensur[e] that noncitizens entering a plea of guilty are actually aware of the possible immigration consequences." (*People v. Akhile* (2008) 167 Cal.App.4th 558, 564.)

Courts of Appeal have held that "[t]he advisement need not be in the statutory language, and substantial compliance is all that is required, 'as long as the defendant is specifically advised of all three separate immigration consequences of his plea.'" (*People v. Castro-Vasquez* (2007) 148 Cal.App.4th 1240, 1244, quoting *People v. Gutierrez* (2003) 106 Cal.App.4th 169, 174.)

When a defendant seeks to vacate a judgment based on an allegation that the trial court failed to give the advisement required by section 1016.5, the defendant must demonstrate: (1) the court taking the plea failed to advise the defendant of the immigration consequences as provided by section 1016.5, (2) as a consequence of his conviction, the defendant actually faces one or more of the statutorily specified immigration consequences, and (3) the defendant was prejudiced by the court's failure to

provide complete advisements. (*Zamudio, supra*, 23 Cal.4th at pp. 199-200.)

The trial court's ruling is reviewed for abuse of discretion. (*Zamudio, supra*, 23 Cal.4th at p. 192; *People v. Limon* (2009) 179 Cal.App.4th 1514, 1517-1518.) Because the trial court is the factfinder on the contested motion to withdraw the plea, its factual determinations are reviewed for substantial evidence. (*People v. Quesada* (1991) 230 Cal.App.3d 525, 533.)[5]

We consider the three *Zamudio* factors in turn.

1. Failure of Advisement

The trial court found that "the admonition in [section] 1016.5 is mandatory, and it is clear that an adequate admonition was not given in this case . . . ."

Nevertheless, in defense of the judgment, the Attorney General claims the trial court's disputed phrase, "excluded from naturalization," substantially complied with the statutory mandate to advise that the defendant may be "excluded from admission." (§ 1016.5; see *People v. Castro-Vasquez, supra,* 148 Cal.App.4th at p. 1244.) The claim borders on frivolous.

Because the phrase, "excluded from naturalization," was followed immediately by the phrase, "be denied naturalization as a United States citizen," anyone not familiar with section 1016.5 or immigration law would understand the first phrase as a

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[5] *People v. Quesada, supra,* 230 Cal.App.3d 525 was superseded by statute on grounds not relevant to this discussion.

terse version of the lengthier, and clearer, second phrase. Defendant cannot reasonably be expected to discern that the two phrases were intended to reflect separate and distinct immigration consequences. Thus, defendant was not "'specifically advised of all three separate immigration consequences of his plea.'" (*People v. Castro-Vasquez, supra,* 148 Cal.App.4th at p. 1244.) Consistent with the trial court's finding, and contrary to the Attorney General's claim, we conclude defendant satisfied the first element of the *Zamudio* test in that the trial court did not substantially comply with the requirements of section 1016.5.

Having rejected the Attorney General's claim of substantial compliance, we also reject her claim that defendant "cannot show prejudice" because the trial court's "advisement substantially complied with section 1016.5 . . . ."

2. Defendant Faces a Specified Immigration Consequence

As the Attorney General concedes, the trial court accepted defendant's evidence that he is being deported as a consequence of his no contest plea. Thus, it is undisputed that defendant has satisfied the second element of the *Zamudio* test in that he actually faces one of the statutorily specified immigration consequences.

3. Prejudice from the Incomplete Advisement

The trial court found that defendant had failed to establish that it was reasonably probable he would not have entered the plea if properly advised. The court explained, "*[t]his isn't a situation where he is pleading to the sheet* or

he is pleading to a particularly egregious consequence, *he is getting the benefit of a significant bargain here*. And like I say, I've got to consider in the real world if at that time he would not have entered the plea but because of that consequence, and I just can't find that." (Italics added.)

Thus, the trial court located a "significant bargain" in the asserted fact that the plea agreement did not require defendant to "plead[] to the sheet" or "plead[] to a particularly egregious consequence." (See *In re Resendiz* (2001) 25 Cal.4th 230, 253-254 (*Resendiz*), disapproved on another point in *Padilla v. Kentucky* (2010) __ U.S. __, ___ [176 L.Ed.2d 284, 296], lead opn. of Werdegar, J. [the defendant's receipt of a "substantial bargain" is evidence that he would *not* have "forgone the distinctly favorable outcome he obtained by pleading, and instead insist[] on proceeding to trial . . . .])

However, the record shows that defendant *did* plead to the "sheet," i.e., the complaint's sole count and sole enhancement. To the extent the finding of "significant bargain" rests on defendant having pleaded to significantly less than all counts and enhancements alleged against him, the finding is not supported by substantial evidence. (*People v. Quesada, supra,* 230 Cal.App.3d at p. 533.)

Believing it had located a bargain in the plea agreement, the trial court had no occasion to search for one in the probation report. Thus, the court did not discuss the report's depiction of defendant as a fully employed, nonviolent, and youthful first offender. Nor did the court discuss the report's

finding of just one weakly-supported factor in aggravation alongside three fully substantiated factors in mitigation.

Our examination of the probation report reveals very little likelihood that, following a jury trial, this youthful first offender would receive a state prison sentence. Moreover, the report reveals an only slightly greater prospect of a disciplinary jail term significantly longer than the 150 days he in fact received. The Attorney General impliedly concedes as much by referring to "a greater amount of local custody, or a prison sentence" merely as *possibilities*. Thus, the probation report contains no substantial evidence that defendant received "a significant bargain" in exchange for his plea.

The Attorney General cites *Resendiz* for the proposition that defendant's "assertion he would not have pled" no contest "'must be corroborated independently by objective evidence.'" (*Resendiz, supra,* 25 Cal.4th at p. 253.) However, *Resendiz* involved deficient performance by counsel, not misadvisement by the court. (*Ibid*.) The only *Resendiz* factor relevant to our very different case is "the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer . . . ." (*Ibid*.) We have already explained that, in this case, the disparity was not great. We conclude the relative lack of disparity independently corroborates defendant's assertion that he would have not entered his plea if correctly advised of its immigration consequences.

Contrary to the Attorney General's argument, no substantial evidence suggests defendant "would have accepted the bargain even if he had received the complete advisement." The trial court's finding that he would have done so (at least until the commencement of the immigration proceedings against him) is not supported by the evidence and must be set aside.

This brings us to the trial court's other reasons for finding defendant had not suffered prejudice. The Attorney General has not attempted to defend these reasons.

The trial court suggested that, "if [defendant] agrees to a voluntary [departure] he will not necessarily be barred from readmission . . . ." However, defendant was not eligible for voluntary departure from the United States because his conviction of possessing marijuana for purposes of sale is an aggravated felony under immigration law. (8 U.S.C. § 1229c(a)(1); see 8 U.S.C. § 1227(a)(2)(A)(iii).)

Because the defect in the advisement consisted of omission of language regarding exclusion from admission to the United States, and defendant currently was facing deportation rather than exclusion, the trial court reasoned that his motion was premature. ("Even if inadmissibility for re-entry in the United States automatically flows from that, I would have to find that the complaint now is premature and speculative.") However, as *Zamudio* explains, an immigrant need not actually be deported or excluded from the United States; it is sufficient to show "'more than just a remote possibility of deportation, exclusion, or denial of naturalization' [citation] . . . ." (*Zamudio, supra*,

23 Cal.4th at p. 202.) Defendant has done so in this case; thus, his claim was not premature or speculative.

The trial court appears to have reasoned that defendant suffered no prejudice because, at the time of the plea, he was represented by counsel and "[t]here was an appreciable amount of time between representation and the entry of plea. There was no rush through this plea. Had anybody wanted more time to understand these ramifications, then there could have been that time."

The trial court's analysis cannot be squared with the legislative intent in enacting section 1016.5. "According to the statement of intent included in the statute, the Legislature was concerned with those circumstances in which 'an individual who is not a citizen of the United States charged with an offense punishable as a crime' enters a plea of guilty or nolo contendere without 'knowing that a conviction of such offense is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.' [Citation.] The Legislature thus enacted section 1016.5 'to promote fairness to such accused individuals by requiring in such cases that acceptance of a guilty plea or plea of nolo contendere be preceded by an appropriate warning of the special consequences for such a defendant which may result from the plea.'" (*People v. Chien* (2008) 159 Cal.App.4th 1283, 1288.)

By mandating the advisement, even in cases where the defendant is represented by counsel and an appreciable amount of

time elapses between the commencement of representation and entry of the plea, the Legislature impliedly has concluded that counsel's efforts, even though reasonably to be expected, are not a sufficient substitute for a timely advisement by the trial court. This implied conclusion is consistent with the maxim that the law does not require idle acts. (Civ. Code, § 3532.) The trial court's analysis is contrary to the Legislature's implied conclusion and cannot be sustained.

The Attorney General has not contended that there are unresolved factual issues requiring trial court resolution on remand. Under these circumstances, we shall direct the trial court to vacate its order denying defendant's motion to vacate the judgment of conviction and to enter a new order granting the motion.

DISPOSITION

The judgment is reversed. The trial court is directed to conduct further proceedings consistent with this opinion.

BLEASE, Acting P. J.

We concur:

HULL, J.

ROBIE, J.